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In The

Supreme Court of the United States

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/k/a OWASSO PUBLIC SCHOOLS; DALE JOHNSON, individually and in his official capacity as Superintendent; LYNN JOHNSON, individually and in her official capacity as Assistant Superintendent; RICK THOMAS, individually and in his official capacity as Principal,

Petitioners,

v.

KRISTJA J. FALVO, as parent and next friend of her minor children, ELIZABETH PLETAN, PHILIP PLETAN, and ERICA PLETAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"), which requires educational institutions to preserve the confidentiality of "education records," prohibits public school teachers of pre-secondary school students from utilizing their students to grade each other's homework papers, quizzes, and tests by having the students exchange papers and mark the correct and incorrect answers thereon as the teacher goes over the answers aloud in class.

PARTIES TO THE PROCEEDING

All parties are named in the caption.

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OPINIONS BELOW

The opinion of the court of appeals is reported at *Falvo v. Owasso Independent School Dist. No. I-011*, 233 F.3d 1203 (10th Cir. 2000), and is printed at Appendix A of the Petition for Certiorari. The opinion of the court of appeals denying rehearing *en banc*, and the dissent of four of the ten active judges of the court of appeals from the order denying rehearing *en banc*, is reported at *Falvo v. Owasso Independent School Dist. No. I-011*, 233 F.3d 1201 (10th Cir. 2000), and is printed at Appendix D of the Petition for Certiorari. The opinions of the district court denying Falvo's motion for a temporary restraining order and granting summary judgment to Petitioners are unreported and are printed at Appendices C and B, respectively, of the Petition for Certiorari.

JURISDICTION

The court of appeals issued an opinion in this case on July 31, 2000, affirming in part and reversing in part the summary judgment granted by the district court. The Petitioners, Independent School District No. 11 of Tulsa County, Oklahoma (the "Owasso School District"), Dale Johnson, Superintendent of the Owasso School District, Lynn Johnson, Assistant Superintendent of the Owasso School District, and Rick Thomas, Principal of the Sixth Grade Center at the Owasso School District (hereafter referred to collectively as the "School District Defendants"), timely filed a petition for rehearing *en banc*. Although the court of appeals declined to grant rehearing, the court vacated its original opinion and issued a

modified opinion on October 4, 2000, responding to points raised in the petition for rehearing *en banc*. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves construction and interpretation of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"). The full text of FERPA is set forth in the appendix to this brief.

STATEMENT OF THE CASE

The facts recited in this statement are based on the undisputed record evidence.

The Owasso School District does not have a formal policy governing peer grading at its school sites. (Record in the Tenth Circuit, Aplee. Supp. App., pp. 152-54). Teachers employed by the Owasso School District have the discretion to permit their students to grade homework papers and tests by exchanging papers and scoring one another's work as the teacher goes over the answers aloud in class. (*Id.*; Petition for Certiorari, App. C-2-3). Teachers employed by the Owasso School District use this practice to varying degrees. (Record in the Tenth Circuit, Aplee. Supp. App., pp. 124-55). The Respondent, Kristja J. Falvo ("Falvo"), agreed that the use of peer grading by her children's teachers varied from teacher to teacher:

> There are some teachers that grade their own papers, and there are some teachers that have the children exchange papers. There are some teachers that have them only exchange maybe daily work. It's nothing that's concrete. It's from a teacher-to-teacher situation. It depends on how the teacher wants to run her classroom.

(J.A. 12).

It is undisputed that teachers do not use peer grading to grade mid-term exams (9 weeks tests) or final semester tests. (J.A. 33).

Teachers utilize peer grading because it allows them to give their students immediate feedback on the lesson. (J.A. 28, 31, 34-35; Petition for Certiorari, App. C-2). Discussion by the teacher of the correct and incorrect answers immediately after the student has performed the work reinforces the lesson taught and the correct answers. (J.A. 28).[1]

It would be impossible for many teachers in the Owasso School District to provide immediate feedback to students if the teachers were required to grade all homework and test papers themselves. In Oklahoma, teachers of grades seven through twelve may lawfully be assigned

[1] The significance of immediate feedback to a student's success in mastering the lesson was confirmed by the affidavit of one of Falvo's expert witnesses, Professor John D. Krumboltz. Professor Krumboltz noted in his affidavit that "[r]esearch findings confirm that immediate feedback aids learning more than does delayed feedback." (Record in the Tenth Circuit, Aplee. Supp. App., p. 227).

to teach up to 140 students per day. (J.A. 31, 34-35, 39-40).[2] It would be virtually impossible for a teacher to grade 140 homework papers or weekly quizzes overnight and have them ready to be returned the following day; a teacher in such a situation would be "overwhelmed." (J.A. 39). The district court found that if teachers are not able to utilize students to grade papers, "students will only receive their results after delay," which "may have a detrimental effect upon both teaching and learning." (Petition for Certiorari, App. C-6).

Peer grading also allows teachers to cover more material and assign significantly more work than would be possible if the teacher had to grade every individual homework paper. (J.A. 36; Petition for Certiorari, App. C-2). The district court found that without the ability to have students grade each other's papers, "teachers will begin assigning less homework and quizzes," which may

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[2] OKLA. STAT. tit. 70, § 18-113.3 (2000 Supp.) provides in part:

> C. Beginning with the 1996-97 school year and each school year thereafter, no teacher who is counted in class size count for grades seven through twelve shall be responsible for the instruction of more than one hundred forty (140) students on any given six-hour school day.

Teachers assigned to kindergarten through the sixth grade routinely teach classes of twenty (20) students. OKLA. STAT. tit. 70, §§ 18-113.1 and 18-113.2 (2000 Supp.). Over the course of a seven-period day, this would result in approximately the same workload as for teachers in grades K-6 as in grades 7-12. A school district that exceeds any of the statutory class size limitations may lose a portion of its state aid.

also "have a detrimental effect" upon education. (Petition for Certiorari, App. C-6).

Teachers prefer to have their students exchange papers and score each other's work rather than grade their own papers because some students will be tempted to cheat if they grade their own papers. (J.A. 28, 37). In addition, unrefuted testimony established that students are more likely to observe and mark errors on another student's homework paper or test than on their own simply because students are more likely to inadvertently overlook mistakes on their own papers. (J.A. 28).

After the correct and incorrect answers have been marked, the papers are returned to their owners. Many teachers then go over the answers again "while the student has his own paper in his hands" to reinforce the lesson. (J.A. 37). This not only provides further reinforcement as a learning process, but it also allows each student an opportunity to review his or her paper and confirm that it was graded properly. (J.A. 37). Students may then be asked to advise the teacher of the score on the homework or test, either by announcing the score aloud from their seats or by taking the paper to the teacher's desk and disclosing the score in confidence. (J.A. 26, 31-32, 35).

Teachers do not record or preserve every score or grade on every homework paper, quiz, or test that is corrected in class. Respondent Falvo admitted that because of this, it is impossible to know which of the grades that may be disclosed in class are selected by the teacher for recording and/or use in calculating a student's final grade:

> I don't know which ones do, and I don't know if there's a way, unless you're in the classroom and watching the grade book, if you can actually keep a record of which ones do [get recorded] and which ones don't. And so I don't have any guarantee that any grade or any average goes into the grade book. But I believe any grade that is called out has a *potential* to go into my son's, child's, my daughter's educational record.

(J.A. 14) (emphasis added).

Falvo is the mother of three children who attend schools operated by the Owasso School District at which peer grading occurs.[3] After moving her family into the Owasso School District and enrolling her children in schools operated by the Owasso School District, Falvo became aware that some of her children's teachers utilized peer grading. (J.A. 10, 22; Record in the Tenth Circuit, Aplt. App., p. 34). At that time, Falvo's son, Philip, was eligible for special education services for language-related skills and had been placed on an Individualized Education Program ("IEP") that provided him 45 minutes of speech and language therapy once a week. (Record in the Tenth Circuit, Aplee. Supp. App., pp. 148-51).[4] Falvo met with

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[3] In October of 1998, when Falvo brought this lawsuit, Falvo's daughter, Elizabeth Pletan, attended the Owasso School District's Eighth Grade Center, her son, Philip Pletan, attended the Owasso Seventh Grade Center, and her daughter, Erica Pletan, attended the Owasso Sixth Grade Center. (J.A. 11). A fourth child, Andrew, attended an elementary school where, according to Falvo, peer grading is not practiced. (J.A. 12-13).

[4] Philip's IEP was discontinued on March 3, 1999, because Falvo felt that it was not necessary for Philip to continue to receive language therapy. (Record in the Tenth Circuit, Aplee. Supp. App., p. 328).

Philip's teachers to express her dissatisfaction with allowing students to grade each other's papers and allowing the students to announce their scores in class. Philip's teachers assured Falvo that Philip did not have to announce his score and could go to the teacher's desk and reveal his score confidentially. (J.A. 22).

Falvo testified that Elizabeth, Philip, and Erica have been embarrassed by participating in peer grading. She testified that both Elizabeth and Philip have had correct answers marked as incorrect on papers graded by other students. (J.A. 11, 17-18). Yet Falvo admitted that each time one of her children had brought such a situation to the attention of his or her teacher, the teacher corrected the paper and allowed credit for the answer. (J.A. 18, 19-20). Indeed, the record reflects that every time one of Falvo's children has approached a teacher at the Owasso School District to request a change in that teacher's grading practices, the teacher has accommodated that request.

Falvo was not satisfied with the willingness of her children's teachers to modify their individual classroom grading practices to accommodate her children. Instead, Falvo demanded that the Owasso School District enact a uniform policy banning peer grading in all of its schools and requiring all teachers either to grade their students' papers themselves or to allow all students to grade their own papers. (J.A. 21). The Owasso School District refused to adopt such a policy, and Falvo sued.

On October 6, 1998, Falvo brought suit in the United States District Court for the Northern District of Oklahoma against the School District Defendants. Relying on 42 U.S.C. § 1983, Falvo alleged that the practice of peer grading as permitted at the Owasso School District violated her children's right of privacy protected by the Fourteenth Amendment and violated the confidentiality requirements of FERPA. Falvo sought damages, a declaratory judgment, and an injunction prohibiting the Owasso School District from permitting its teachers to allow students to grade each other's papers. (Record in the Tenth Circuit, Aplt. App., pp. 32-43).

Eight days after Falvo filed her complaint, the United States District Court for the Northern District of Oklahoma, the Honorable Terry C. Kern presiding, conducted an evidentiary hearing on Falvo's request for a temporary restraining order and a preliminary injunction. On October 16, 1998, the district court entered a written order declining to grant injunctive relief and setting forth the findings of fact and conclusions of law on which its decision was based. (Petition for Certiorari, App. C).

Without conducting any discovery or in any way further developing the factual record, Falvo filed a motion for declaratory judgment and partial summary judgment and supporting brief. (Record in the Tenth Circuit, Aplt. App., pp. 64-66; Aplee. Supp. App., pp. 191-270). Falvo supported her motion for partial summary judgment with affidavits from three college

professors.[5] (Record in the Tenth Circuit, Aplee. Supp. App., pp. 217-58).

The School District Defendants filed a cross-motion for summary judgment in which they agreed that the case presented no dispute as to any material fact and asserted that they were entitled to judgment as a matter of law. With regard to Falvo's FERPA claim, the School District Defendants relied on an opinion letter issued by the Family Policy Compliance Office ("FPCO") of the United States Department of Education that addressed the specific issue raised by this action. (Petition for Certiorari, App. F). The FPCO is the federal agency responsible for enforcing FERPA. In that letter, the FPCO concluded that using students to grade a test or homework assignment of another student and calling out that grade in class is *not a violation* of FERPA. The FPCO stated:

> FERPA would not prohibit teachers from allowing students to grade a test or homework assignment of another student or from calling out that grade in class, even though such grade may eventually become an education record. Such papers being graded and the grades which will be assigned would fall outside the FERPA definition of education records as they are not, strictly speaking, "maintained" by an educational agency or institution at that point.

(*Id.*, F-4-5).

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[5] The district court noted that these affidavits "largely take the form of expressing opinions as to what the law *should* be." (Petition for Certiorari, App. B-4, n.1) (emphasis in original).

The district court denied Falvo's motion for partial summary judgment and granted summary judgment to the School District Defendants. The court rejected Falvo's Fourteenth Amendment right of privacy claim, concluding that "the interim tests and homework assignments . . . are not 'highly personal' matters worthy of constitutional protection." (Petition for Certiorari, App. B-5). The court also rejected Falvo's FERPA claim, deferring to the FPCO's interpretation of the statute and concluding that such interpretation "is reasonable and does not conflict with the expressed intent of Congress." (*Id.*, B-4).

The United States Court of Appeals for the Tenth Circuit affirmed the district court's grant of summary judgment on Falvo's Fourteenth Amendment privacy claim, reasoning that although "the school work and test grades of pre-secondary school students constitute somewhat personal or intimate information," to conclude that such information is so highly personal as to fall within the zone of constitutional protection "would trivialize the Fourteenth Amendment." (Petition for Certiorari, App. A-8).

The court of appeals reversed the grant of summary judgment on the FERPA claim, ruling that the district court had erred in giving deference to the FPCO's interpretation of FERPA. The court ruled that "the meaning of the terms 'education records' and 'maintain' are clear from [FERPA] itself," thus deference to the FPCO was inappropriate because "a court can only defer to an agency's interpretation if a statute is deemed ambiguous." (*Id.*, A-18). The court of appeals found no ambiguity in FERPA that would justify deferring to the

FPCO's interpretation of the statute. The court further determined that the FPCO's interpretation was not "entitled to respect" under this Court's decision in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

The court of appeals concluded that "[b]ased purely on the language of the statute itself . . . the grades which students record on one another's homework and test papers and then report to the teacher constitute 'education records' under FERPA." (*Id.*, A-20-21). The court determined that a student who scores another student's homework or test paper is "a person acting for" an educational agency or institution who "maintains" the score or grade on such paper "to allow the teacher to use the grade in some fashion." (*Id.*, A-21, 24). The court concluded that this practice violated FERPA irrespective of whether the students announce their grades aloud in class or report their grades to the teacher in confidence. The court specifically noted that "the method of reporting the grades is irrelevant to our analysis, because a disclosure occurs at the earlier stage when one student grades the work of another." (*Id.*, A-21, n.10).

The court found no significance in the fact that the teachers have discretion to record or not record the grade for use in calculating the student's final grade in the class, reasoning that because "at least some grades which students give one another and report to the teacher are then recorded in the teacher's grade book," those grades are " 'maintained . . . by a person acting for [an educational] agency or institution' and constitute 'education records.' " (*Id.*, A-21). The court also noted in a footnote that "[e]ven if the homework or test grade never figures into the student's final grade, the teacher must still

receive the grade to use it for some other purpose, perhaps to preserve, in a gradebook or otherwise, a yardstick of each student's performance and progress to better develop effective teaching strategies." (*Id.*, A-24, n.11).

The court of appeals concluded that the Owasso School District's "grading practice does violate FERPA" and remanded the case to the district court for further proceedings. (*Id.*, A-32).

The School District Defendants timely filed a petition for rehearing *en banc*, which the court of appeals denied on October 4, 2000. (Petition for Certiorari, App. D). Four of the ten active judges on the Tenth Circuit Court of Appeals dissented from the denial of the petition for rehearing *en banc*. The dissenting judges observed that the court's decision "[d]efining 'education records' to include 'grades which students record on one another's homework and test papers and then report to the teacher' . . . is a vast expansion of the actual words of the statute, and [is] unsupported by the legislative history." (*Id.*, D-2-3). The dissenting members of the court concluded that "[a] careful reading of FERPA and its legislative history requires a much narrower definition of 'education records.'" The dissent noted that the majority's interpretation of the term "education records" to include the grades placed on daily homework papers and interim tests "necessarily invokes the right to a hearing to challenge the grade" recorded on that homework paper or interim test under 20 U.S.C. § 1232g(a)(2) and obligates educational institutions "to maintain an access record indicating those who have obtained or requested access to" the grade recorded on that homework paper or interim test under 20 U.S.C. § 1232g(b)(4)(A). The dissent

observed that "[g]iven the thousands of grades a student might receive over time, this seems impossible, if not implausible." (*Id.*, D-5).

The School District Defendants timely filed a petition for a writ of certiorari, and this Court granted certiorari herein on June 25, 2001.

SUMMARY OF THE ARGUMENT

The decision of the court of appeals is inconsistent with the plain language of FERPA. Congress defined "education records" as those records that contain personally identifiable information and are "maintained by an educational agency or institution or by a person acting for such agency or institution." The court of appeals distorted the plain meaning of the word "maintain" by reading it to include the *creation* of a "record" by a student scoring a homework paper, quiz, or test. In addition, the court of appeals illogically concluded that an "education record" is "released" in violation of the statute at the same instant it is created "by a person acting for" the educational agency or institution because the person who created the record knows the content thereof.

The court's interpretation means that the right granted by FERPA enabling parents to compel a due process hearing to correct "inaccurate" or "misleading" information in a student's "education record" applies to errors made in scoring the number of correct and incorrect answers on a student's daily homework paper, if the teacher utilized a student, teacher's aide, or parent or other adult volunteer to grade such paper. The court's

reading also imposes upon such teachers the obligation to maintain a separate record of access to and requests for access to each student's "education records" in the teacher's possession.

The court of appeals refused to follow the long-standing interpretation of FERPA followed by the Family Policy Compliance Office, the agency responsible for enforcing the statute. The FPCO's interpretation should have been accorded respect (if not deference) by the lower court because the FPCO properly recognized that Congress did not intend for FERPA to interfere with "normal and legitimate educational activities and functions."

The legislative history of FERPA indicates that Congress intended the statute to apply only to the permanent, institutional records maintained by a registrar or other central records custodian. The legislative history further indicates that Congress meant to exclude from the definition of "education records" teacher grade books, and the routine grades and scores recorded therein, because Congress intended the exception for notes and materials "in the sole possession of the maker thereof" to apply to grade books and their contents.

Finally, the court of appeals' interpretation of FERPA is far more intrusive than the court of appeals appeared to realize and will prohibit or burden a wide array of sound and beneficial educational practices followed by teachers in elementary schools, secondary schools, colleges, and universities.

ARGUMENT

1. The Plain Language of FERPA Shows that Congress Did Not Intend the Term "Education Records" to Include Grades on Routine Homework Assignments, Quizzes, and Tests.

The Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, provides in subpart (a)(1)(A) that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution . . . the right to inspect and review the education records of their children." Subpart (b)(1) of FERPA provides that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information . . .) of students without the written consent of their parents. . . . " Thus, the text of the statute clearly identifies its two main purposes: to grant parents access to their children's education records and to protect those records from access by unauthorized persons.

The statute defines "education records" as follows:

> For the purposes of this section, the term "education records" means . . . those records, files, documents, and other materials which –
>
> (i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A).[6]

In concluding that FERPA prohibits peer grading of homework papers, quizzes, and tests in the nation's classrooms,[7] the Tenth Circuit focused on the two-part definition of education records found in subpart (a)(4)(A) of the statute. (Petition for Certiorari, App. A-18, 20-21). The court noted that the grades students place on each other's papers "contain information directly related to a student," thus satisfying the first part of the definition. (*Id.*, A-21). The court then reasoned that in placing a grade or

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[6] Four types of records are specifically excluded from the definition of "education records": "records of instructional, supervisory, and administrative personnel and education personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute" (sole possession notes), records created for law enforcement purposes by a law enforcement unit of an educational agency or institution, records relating exclusively to persons who are employed by an educational agency or institution but who are not attending such educational agency or institution as a student, and records relating to students over the age of 18 who attend postsecondary educational institutions that are made by a physician, psychiatrist, psychologist, or other professional made in connection with the provision of treatment to the student. 20 U.S.C. § 1232g(a)(4)(B)(i)-(iv). In regulations promulgated under FERPA, the Department of Education has also excluded alumni records containing only information about former students after they have left a school. 34 C.F.R. § 99.3.

[7] FERPA applies to "any public *or private* agency or institution which is the recipient of funds under any applicable program." 20 U.S.C. § 1232g(a)(3) (emphasis added).

score on another student's paper, students are preserving the grade for some further use by the teacher, thereby satisfying the second part of the definition. (*Id.*, A-24). The court concluded that FERPA was thereby violated because the "record" thus created is simultaneously "released" – or disclosed – to the student who prepared it.

The analysis of the court of appeals is seriously flawed. First, the court distorted the plain meaning of the word "maintain." "A fundamental canon of statutory instruction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perin v. United States*, 444 U.S. 37, 42 (1979). As the Solicitor General pointed out in the *amicus* brief filed in this matter on June 1, 2001, the ordinary meaning of the word "maintain" is "to keep in existence or continuance; preserve, retain." Brief for the United States as Amicus Curiae, p. 16, *quoting Random House Dictionary of the English Language* 1160 (2d ed. 1987).

Students scoring answers on a homework or test paper as correct or incorrect are not preserving existing information; *they are creating new information*. Until the paper has been scored and the number of correct or incorrect answers totaled, there exists no "record" to be "maintained." If Congress had meant for the word "maintain" to include the creation or collection of information, it certainly would have said so. Under the plain and ordinary meaning of the word "maintain," only those final grades that are recorded on the student's transcript and preserved in the educational agency's permanent, institutional records are "maintained" within the meaning of FERPA.

The Tenth Circuit interpreted "maintain" to mean the creation of information that may be preserved for a brief period of time to allow the teacher to make some use thereof. Yet by that logic, a student's work on a chalkboard could be an education record, because it is "maintained" until the teacher has checked the work and given the student permission to erase it.

In addition, the court of appeals illogically concluded that the "record" created when one student scores another's homework or test paper is "released" by the very act of creating it. According to the court, a student who scores another student's work is "a person acting for" the educational agency. (Petition for Certiorari, App. A-24). That student "maintains" the record by "preserving the grade until the time it is reported to the teacher for further use." (*Id.*). Yet the only "release" found by the court of appeals is that the student who was "acting for" the educational agency now knows the grade or score: "a disclosure occurs . . . when one student grades the work of another."[8]

This is both unreasonable and unsound. The statute cannot plausibly be interpreted to mean that when an educational agency or institution appoints a student to act as its agent in preparing a record, the very act of preparation by such agent constitutes an unlawful "release" or disclosure of that record. If that were the law,

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[8] The court of appeals made it clear that whether or not the grade is subsequently announced is irrelevant: "the method of reporting the grade is irrelevant, because a disclosure occurs at the earlier stage when one student grades the work of another." (*Id.*, A-21, n.10).

no educational agency or institution (including colleges and universities) could utilize students as teaching assistants to grade or record the grades of examination papers, reports, or written laboratory observations. It cannot plausibly be claimed that Congress intended this result.

The Tenth Circuit's decision is inconsistent with the plain meaning of FERPA. Its decision should be reversed.

2. The Court of Appeals' Interpretation of "Education Records" Cannot Be Reconciled with Other Provisions of the Statute.

The straight-forward reading of the words of the statute is confirmed when the phrase "education records" is considered in the context of other provisions of FERPA. As this Court explained in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989), "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* at 809. This point was reiterated in *Bailey v. United States*, 516 U.S. 137 (1995), wherein this Court again explained, "We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme." *Id.* at 145.

Viewed in the context of the entire statute and with a view to the overall statutory scheme, the term "education records" cannot reasonably be given the broad interpretation adopted by the court of appeals. The court of appeals' interpretation is inconsistent with two separate

substantive components of the statute: the right of parents to a hearing to challenge the contents of an education record, and the duty on the official "responsible for the custody" of a student's education records to maintain a separate record of those persons, agencies, or organizations that have requested or obtained access to those education records.

In subpart (a)(2) of FERPA, Congress specifically provided that parents wishing to "challenge the content" of a student's education records must be afforded "an opportunity for a hearing":

> No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

20 U.S.C. § 1232g(a)(2).

Under the Tenth Circuit's construction of "education records," every educational agency or institution that is subject to FERPA must provide a hearing to any parent who wishes to challenge the accuracy of any score or

grade recorded on any homework paper, quiz, or test by his or her child to correct or delete any "inaccurate" or "misleading" information contained therein if that homework, quiz, or test was graded by someone other than the teacher. In *Tarka v. Cunningham*, 917 F.2d 890 (5th Cir. 1990), the Fifth Circuit suggested that this hearing right would apply to an education record that is "mathematically incorrect," noting that "[s]tudents' grades, as reflected in educational records, can only be inaccurate or misleading if they do not reflect what the grader intended or if they are mathematically incorrect." *Id.* at 891. Read in light of the Fifth Circuit's analysis in *Tarka*, the Tenth Circuit's interpretation of "education records" would entitle a parent to compel a school district to grant a hearing to correct the grade on a 10 point math paper or spelling test if a student, teacher's aide, adult volunteer, or team teacher graded that paper and properly marked only one answer as incorrect or one word as misspelled but mistakenly gave the paper a score of "8" instead of "9"out of 10.[9]

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[9] The Tenth Circuit supported its conclusion by suggesting that FERPA provides the necessary recourse for a parent to address a situation in which one student consistently records lower grades on another student's paper than that student actually earned, which might "significantly impact the slighted student's more permanent grades." (Petition for Certiorari, App. A-26). But as the School District Defendants explained in their Petition for Certiorari, the scenario described by the Tenth Circuit, in which a student's final course grade is affected, would also be an appropriate situation for a curative hearing under the School District Defendants' reading of the statute. (*Id.*, p. 25, n.10). But the court of appeals failed to offer any explanation why Congress would have granted such a hearing right to challenge the score recorded on a routine homework

Moreover, the hearing required by subpart (a)(2) must be conducted "in accordance with regulations of the Secretary." Pursuant to regulations promulgated by the Department of Education, the *minimum requirements* for such a hearing include that the hearing be conducted by a disinterested official of the educational agency or institution (or by another disinterested individual) and that the parent or eligible student be allowed "a full and fair opportunity to present evidence relevant to the issues raised. . . . The parent or eligible student may, at their own expense, be represented by one or more individuals of his or her own choice, including an attorney." 34 C.F.R. § 99.22. Thus, a parent (or an eligible student) seeking to challenge an inaccurate or misleading education record is entitled to an evidentiary hearing before a neutral decisionmaker at which the parent may be represented by an attorney of his or her choice. It cannot be seriously suggested that Congress intended to compel educational agencies and institutions to hold formal due process hearings to allow parents to contest the scores recorded on their children's routine class work any time someone other than the classroom teacher scores or grades the paper. Such a requirement would dramatically change educational practices not only in our nation's schools but also on college and university campuses, where the use of student assistants to grade papers is common.

Equally problematic for the Tenth Circuit's analysis is the access record requirement of 20 U.S.C. § 1232g(b)(4)(A). That provision states.

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paper when the score on that paper fails to impact the student's ultimate grade in the course.

> Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals . . . agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, *to the school official and his assistants who are responsible for the custody of such records*, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

20 U.S.C. § 1232g(b)(4)(A) (emphasis added).

Because the court of appeals concluded that every grade or score recorded by another student on a homework paper or test is an education record, notwithstanding that those grades may never be recorded in the teacher's grade book, the court of appeals' analysis means that *every teacher* is a custodian of "education records" within the meaning of subpart (b)(4)(A) if papers graded by a student, teacher's aide, adult volunteer, or team teacher are delivered to the teacher. Thus, every such teacher has the obligation to keep a *separate record* for each of his or her students to indicate all individuals, agencies, or organizations "which have requested or obtained access" to that student's papers and identifying "the legitimate interest that each such person, agency, or organization has in obtaining this information."

The imposition of this obligation to maintain such an access record, without more, leaves no doubt that Congress did not intend for the routine grades recorded by teachers on a daily basis to fall within FERPA's definition of "education records."

More important, however, is the fact that in subsection (b)(4)(A), Congress expressly provided for a single school official (and his assistants) to be "*responsible for the custody*" of education records. This language reflects a Congressional intent that there be a *central custodian* of education records at each educational agency. Under this construction of FERPA, the official "responsible" for these education records is clearly intended to be the educational agency's registrar.

This interpretation of FERPA is consistent with the practices of educational agencies and institutions across America, with which Congress must be presumed to have been familiar. An educational agency or institution's registrar is commonly "responsible for custody" of the permanent, institutional records of that educational agency or institution, and the registrar often has assistants who share the responsibility for these duties.

The Tenth Circuit rejected this interpretation, however, finding no inconsistency between FERPA's requirement that "the school official . . . responsible for the custody of such records" also maintain an access record and the court's determination that every grade or score written on every paper graded by a student, teacher's aide, adult volunteer, or team teacher is an education record. According to the court of appeals, "[N]othing in this court's interpretation of the term 'education records'

would prohibit a central custodian from maintaining these access records. . . . " (Petition for Certiorari, App. A-28). Yet this statement ignores the fact that FERPA expressly requires that the access record be kept with each student's education records: "Each educational agency or institution shall maintain a record, *kept with the education records of each student*," identifying those persons, agencies, or organizations that have requested access. 20 U.S.C. § 1232g(b)(4)(A) (emphasis added).

Because the plain language of subpart (b)(4)(A) states that the access record shall be kept with the student's education records *and* be available to "the school official and his assistants who are responsible for the custody of such records," the Tenth Circuit's suggestion that a central custodian of records can maintain the access record is incorrect. If the scores on routine classroom papers that are graded by anyone other than the teacher are, in fact, education records, then the teacher is clearly the "custodian" of those education records and must, of necessity, be responsible for maintaining the access record required by subpart (b)(4)(A).

Indeed, under the court of appeals' interpretation, *until* the papers are turned in to the teacher, the person scoring the paper is the agent of the educational agency or institution and is "maintaining" the record, thus the statutory duties of subpart (b)(4)(A) would devolve upon him. It cannot reasonably be suggested that Congress intended to impose this duty on student assistants or adult volunteers.

The court of appeals' conclusion that "education records" includes the grades placed on daily homework

papers and routine tests is at odds with FERPA's overall statutory scheme. The four judges who dissented from the denial of rehearing *en banc* correctly noted that the court of appeals' decision makes the hearing right of 20 U.S.C. § 1232g(a)(2) as well as the access record requirement of 20 U.S.C. § 1232g(b)(4)(A) applicable to "the thousands of grades a student might receive over time." (Petition for Certiorari, App. D-5). As Justice Ginsburg noted in her concurring opinion in *Things Remembered, Inc. v. Petraraca*, 516 U.S. 124 (1995), "It would show little respect for the legislature were courts to suppose that lawmakers meant to enact an irrational scheme." *Id.* at 135 (Ginsburg, J., concurring). The court of appeals attributes to Congress a legislative scheme that is both "implausible" and "impossible." (Petition for Certiorari, App. D-5). The Tenth Circuit's decision was wrong and should be reversed.

3. The Court of Appeals Should Have Deferred to the Established and Long-Standing Interpretation of the Family Policy Compliance Office.

The sensible reading of the statute by the dissenting judges in the court of appeals takes on added weight because it is the interpretation consistently followed by the agency charged with administering the statute.

The court of appeals gave two reasons for refusing to defer to the FPCO's interpretation. First, the court characterized the statutory language defining "education records" as "clear on its face" in requiring the interpretation it adopted. (Petition for Certiorari, App. A-26). The preceding sections of this brief demonstrate the error of

that assertion. Indeed, under the most natural reading of the word "maintained," a score or grade on a paper is not maintained until the teacher decides that it will be recorded for future use in determining a course grade, and a record is not "released" to a student by that student's act of creating such record. Also, the broad definition of "education records" adopted by the court of appeals simply cannot be squared with FERPA's grant of a hearing right to challenge the content of "education records" and the statute's obligation, imposed on "the school official . . . responsible for the custody" of such records, to maintain a separate record of access.

The second reason advanced by the court of appeals for rejecting the FPCO's position was its conclusion that the July 15, 1993, opinion letter from LeRoy S. Rooker, the Director of the FPCO, to Wallace N. Raupp, II, Labor Relations Specialist with New York State United Teachers, setting forth the FPCO's interpretation (Petition for Certiorari, App. F-3-6), lacked "the power to persuade" and therefore was not "entitled to respect" under this Court's decision in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The court of appeals observed that under this Court's recent decision in *Christensen v. Harris County*, 529 U.S. 576 (2000), the deference a court would ordinarily accord to an agency's interpretation of an ambiguous statute under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), does not extend to an interpretation contained in an opinion letter. (Petition for Certiorari, App. A-18-19).

As support for its conclusion that the FPCO letter was unpersuasive under *Skidmore*, the court of appeals

pointed to a qualifying statement in the letter and suggested that "the FPCO may not have thoroughly considered the issue. . . . " (*Id.*, A-19).[10] The court further found the FPCO opinion "bereft of any reasoning underlying the rather conclusory opinion that grades written down by other students and announced to the teacher are not 'maintained' as required under FERPA." (*Id.*, A-20). Finally, the court found significant the FPCO's use of the language " 'maintained' by an educational agency or institution" rather than the broader language from FERPA that encompasses records "maintained by an educational agency or institution *or by a person acting for such agency or institution.*" (*Id.*, A-20, quoting 20 U.S.C. § 1232g(a)(4)(A)(ii) (emphasis added by court)).

Although the court criticized the FPCO for failing to "thoroughly consider[ ] the issue" and characterized the agency's analysis as "cursory and purely hypothetical," the court failed to identify any additional factors relevant to the issue of peer grading that the FPCO had overlooked. The court did not point to any fact or consideration present in this case that might have caused the FPCO to reach a different conclusion. Because the court failed to specify any further issues that the FPCO should

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[10] In its July 15, 1993, letter, the FPCO stated:

> Because you do not fully explain the details surrounding the activities you identify, it would not be appropriate for this Office to comment on whether the District's participation in the activities would violate rights afforded parents by FERPA. However, below is a general discussion of FERPA as it relates to the types of activities you present.

(Petition for Certiorari, App. F-3-4).

have considered or any further analysis that the FPCO should have performed, the court's criticism of the FPCO's consideration of this issue as "hypothetical" rings hollow.

The court of appeals' criticism of the FPCO letter as "bereft of any reasoning" to support its result is likewise unfounded. The FPCO specifically stated in its opinion letter that FERPA is not "intended to interfere with a school's, or classroom teacher's, ability to carry out what are generally considered to be normal and legitimate educational activities and functions." The FPCO went on to explain that "a thoughtful, common sense, and flexible approach is necessary" in judging the impact of classroom activities on a student's rights under FERPA. (Petition for Certiorari, App. F-4). Thus, contrary to the court of appeals' implication, the FPCO did not merely state a conclusory opinion; it explained the rationale underlying its analysis.

Finally, contrary to the court's reasoning, the language "maintained . . . by a person acting for such agency or institution" does not undercut the FPCO's analysis. To the contrary, as was discussed at p. 18, *supra*, the court's focus on that language leads to the absurd conclusion that a record is unlawfully *disclosed* at the instant the person acting as the agent of the educational agency *creates* it.

As the following two sections of this brief will show, the FPCO correctly discerned Congress' intent and rightly anticipated that a contrary interpretation would have chaotic consequences.

4. The Legislative History Supports the Family Policy Compliance Office's Interpretation and Refutes the Analysis of the Court of Appeals.

The legislative history of FERPA, although somewhat limited, reflects an intent by Congress to limit "education records" to those central, institutional records maintained in a student's permanent file. Indeed, in its initial version, FERPA applied to

> any and all official records, files, and data directly related to [a student], *including all material that is incorporated into each student's cumulative record folder*, and intended for school use or to be available to parties outside the school or school system, and specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns.

Pub. L. No. 93-380, § 513, 88 Stat. 484, 571 (1974) (emphasis added).

Congress amended FERPA in December of 1974 and replaced this laundry list of protected records with the current definition of "education records." Pub. L. No. 93-568, § 2, 88 Stat. 1855, 1858 (1974). The authors of the amendment placed a joint statement concerning the proposed amendment into the Congressional Record, making clear that the change was not intended to expand the reach of the statute beyond institutional records. With

regard to the hearing right granted by subpart (a)(2) and discussed at pp. 20-22, *supra*, the joint statement of Senator James L. Buckley of New York and Senator Claiborne Pell of Rhode Island provided:

> There has been much concern that the right to a hearing will permit a parent or student to contest the grade given in the student's performance in a course. That is not intended. It is intended only that there be procedures to challenge the accuracy of *institutional records* which record the grade which was actually given. Thus, the parents of a student could seek to correct an improperly recorded grade, but could not through the hearing required pursuant to law contest whether the teacher should have assigned a higher grade because the parents or students believe that the student was entitled to the higher grade.

120 Cong. Rec. 39,862 (1974) (Joint Statement in Explanation of Buckley/Pell Amendment) (emphasis added). Legal commentators have noted that the joint statement was printed "at a time when no committee hearings had been held and no other document existed that spelled out the intentions of FERPA's sponsors . . . [and] has become important to judges forced to interpret the statute." Thomas R. Baker, *Inaccurate and Misleading: Student Hearing Rights Under FERPA*, 114 Ed. Law Rep. 721, 726 (Feb. 1997). The Fifth Circuit relied on the joint statement as reflecting the intent of Congress with regard to the extent of the hearing right granted by 20 U.S.C. § 1232g(a)(2) in its decision in *Tarka v. Cunningham*, 917 F.2d at 892.

Because the sponsors of the amendment that inserted the present definition of "education records" into FERPA

stated that the right to a hearing to challenge "education records" was intended only to apply to *institutional records*, the term "education records" should be interpreted consistently with that intent.

The legislative history also suggests that a third subpart of FERPA – the sole possession notes exception of subpart (a)(4)(B)(i)[11] – excludes from the definition of "education records" the kind of routine homework and test grades at issue here. Senators Buckley and Pell stated:

> The amendment makes certain reasonable exceptions to the access by parents and students to school records. The private notes and other materials, *such as a teacher's daily record book*, created by individual school personnel (such as teachers, deans, doctors, etc.) as memory aids would not be available to parents or students, provided they are not revealed to another person, other than in the case of a substitute who performs another's duties for a temporary period.

120 Cong. Rec. 39,862 (1974) (Joint Statement in Explanation of Buckley/Pell Amendment) (emphasis added).[12]

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[11] *See* note 6, *supra*.

[12] In *Letter to Yorba Linda (CA) Elementary School District*, 257:626 EDUC. FOR THE HANDICAPPED LAW REPORT (Dec. 31, 1984), the Office for Civil Rights of the United States Department of Education responded to a complaint under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, in which a parent alleged that a teacher intentionally destroyed his child's "achievement and performance records," specifically, the teacher's grade book. Without citing FERPA, the Office for Civil Rights noted that although most of the teachers at the school district under investigation did keep a grade book, that grade book was "not a document that is reviewed by other staff or kept as part of the formal educational record." The California State Department of Education further informed the Office for Civil Rights that "a teacher's record book is a personal record which is not a part of the educational records maintained by the district. . . . " The Office for Civil Rights found no violation of Section 504 under these facts.

The court of appeals found this subpart inapplicable to this dispute, asserting that a teacher's grade book becomes an education record if it is disclosed to anyone other than a substitute. The court then reasoned that a grade book is effectively disclosed to students if the students are aware of a grade or score that will ultimately be recorded in the grade book. (Petition for Certiorari, A-22).

This reasoning cannot withstand scrutiny. First, as the four dissenting judges noted, there is a major distinction between raw grades or scores on student papers (that may or may not ultimately be considered in calculating a student's final course grade) and grades actually recorded in a grade book. (Petition for Certiorari, App. D-3-4). If Congress had contemplated that a grade that has not yet been recorded – and may never be – could nonetheless be an "education record," surely it would have used different words than those appearing in the statute. The dissenting judges correctly observed that "[w]hile grade books *may* qualify as institutional records, grades on papers certainly do not." (*Id.*, D-5) (emphasis added).

Moreover, Falvo acknowledged that it is impossible to know at the time students score each other's papers

whether a teacher will or will not record that score or grade in his or her grade book. (J.A. 14). Faced with reconciling this fact with FERPA's application only to "records" that are "maintained," the Tenth Circuit concluded (1) that the student grading the paper is "maintaining" the grade until it is turned in to the teacher, and (2) that a grade is "maintained" so long as the teacher is using the grade for *some purpose*, including "to preserve . . . a yardstick of each student's performance and progress to better develop effective teaching strategies." (Petition for Certiorari, App. A-24, n.11). As previously noted at p. 18, *supra*, and as is discussed in more detail at pp. 39-40, *infra*, this logic leads to the absurd result that student work on a chalkboard is an "education record" because such work has been preserved on the chalkboard until the teacher checks the work and directs the student to erase it.

The second flaw in the court of appeals' analysis of the "sole possession notes" exception is that it results in wholly illogical distinctions between the treatment of identical grade books. Assume teacher A and teacher B both maintain grade books that they disclose to no one other than a substitute teacher. Assume their principal asks to see teacher A's grade book for an entirely appropriate reason, such as to confirm that a student was absent from teacher A's class on a certain day.[13] Under

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[13] Under 20 U.S.C. § 1232g(b)(1)(A), this disclosure would not be a violation of FERPA, but the Tenth Circuit would hold that such disclosure does result in the grade book becoming an education record under 20 U.S.C. § 1232g(a)(4)(B)(1) and entitling parents to the hearing rights conferred by 20 U.S.C. § 1232g(a)(2).

the Tenth Circuit's analysis, teacher A's grade book has now become an education record to which FERPA applies, whereas teacher B's grade book remains excluded from the definition of education record. This is both unsound and illogical.

The third flaw in the court of appeals' analysis is that it effectively eviscerates the "sole possession notes" exception as it relates to any notes containing information that was disclosed to a teacher or school official by a third party other than a substitute. Under this analysis, any information disclosed by one student about another – as in the case of peer grading – would be an education record. For instance, assume that student A tells her counselor that she thinks her best friend, student B, is being molested by student B's parent. Assume the counselor records this information on a confidential memorandum to the counselor's file. Under the Tenth Circuit's analysis, the counselor's note would be an education record that student B's parent would be entitled to see, because student A is also aware of the information recorded by the counselor on the memorandum.

The legislative history of the "sole possession notes" exception, and the foregoing examples, show that Congress simply could not have intended for the routine grades recorded in a teacher's grade book to be considered "education records." As the dissenting judges noted, the court of appeals' decision "is a vast expansion of the actual words of the statute, and [is] unsupported by the legislative history." (Petition for Certiorari, App. D-2-3).

5. The Court of Appeals' Interpretation of FERPA Needlessly Burdens Sound Educational Practices.

The decision of the court of appeals has caused widespread concern and confusion, not only about the legality of peer grading, but about many other common and well established educational practices. For example, the Tenth Circuit's decision has called into question the propriety of allowing parent volunteers to check papers, displaying graded student artwork and science projects, and publishing honor rolls or lists of students with perfect attendance. Greg Toppo, Associated Press, *Students Checking Each Other's Work May Not Make the Grade*, WASHINGTON POST, July 15, 2001, at A4. *See also*, Gregory H. Perry, *Volunteers Enter the Schoolhouse Gate*, 79 NEB. L. REV. 998, 999 n.7 (2000); Heather May, *Pupil Graded Work Fails Privacy Test*, SALT LAKE TRIBUNE, Sept. 7, 2000, at A1.

It is difficult to imagine how some courses could be conducted under the Tenth Circuit's reasoning. In band, orchestra, and music classes, students earn the rank of "first chair," "second chair," "third chair," etc., by virtue of their performance on playing tests that occur in class. Every student in the band or orchestra knows who is first chair on any instrument. In speech, drama, and debate classes, students not only observe each other's performances, but they also often participate in evaluating those performances, and all of the students in those classes know who the teacher has selected for speech and debate competitions or for the lead roles in a class theatrical performance project. Students in fine arts classes see each other's creations, whether a painting, sculpture,

collage, or other project, take shape over the course of the school year and know whose pieces have been selected by the teacher for public display, even if no names appear on those pieces.

Moreover, the Tenth Circuit's decision would prohibit teachers from grading projects assigned to teams of students on the basis of the team's performance, because if the teacher gives a "team grade," everyone on the team will know that his or her teammates received the same grade. Yet teachers often choose to grade such projects on a team basis for the very purpose of encouraging the students to learn to work together, apportion duties, and carry their own share of the load. Assigning a grade to the team, rather than to each individual team member, is an effective means of promoting these goals.

At the college level, the decision below would imperil the use of teaching assistants to grade papers. At the law school level, it would imperil the use of law fellows in legal research and writing programs.

With respect to peer grading in pre-secondary schools (the subject of this case) and high schools, the decision of the lower court denies teachers the right to an established and pedagogically useful educational tool.[14]

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[14] In the WASHINGTON POST article, the author described how one teacher, when needing quick results from a quiz in her Spanish class, "has her students pass their work to classmates and then goes over the answers with them. In a few minutes, she knows who understood the lesson and who did not." Toppo, WASHINGTON POST, at A4. Another teacher from Bismark, North Dakota, explained that "asking students to swap papers is essential for her because she teaches five classes and 130

There is no dispute that students benefit from the immediate feedback peer grading facilitates.[15] Moreover, evidence strongly indicates that peer grading itself has educational benefits that support its continued use. A report published by the Oregon University System in 1998 focusing on the implementation of standards-based education in Oregon included the following student comments regarding the benefits of peer grading:

> At three high schools, students in some PASS [Proficiency-based Admissions Standards System] classes were involved in peer review and peer editing. When reviewing each other's work, students used the same scoring guides that their teachers used. Two students shared their positive experiences:
>
> "We've been doing a lot of peer editing, which is really helpful to see what kind of mistakes other people are making and to see how to correct them. For example, [one student] helped me find out how to eliminate passive voice, and that really improved my writing. And by correcting other people's papers, I see similar mistakes that they're making, but because I didn't write it, I have another view on it."

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students a day." *Id.* A Utah teacher quoted by the SALT LAKE TRIBUNE stated that "she would spend 30 hours a week correcting papers if she didn't have help from her students." She pointed out that such time is "better spent actually teaching her students." May, SALT LAKE TRIBUNE, at A1.

[15] *See* Note 1, *supra*.

The second student continued:

> "I think it helps, too, because grading other people's papers, you see those mistakes, and it helps you look at your own writing, to . . . kind of read it impersonally, and you know I see so many more mistakes in my own writing. I can just look right through and do a pretty good correction of a first draft for myself."

Implementing the PASS System: How Students Perceive Its Effect on Their Learning, Oregon University System PASS Reports, Fall 1998, No. 1, p. 7 (available at *http://www.ous.edu/pass/documents/archive.html/*).

The analysis of the lower court, if endorsed by this Court, would fundamentally alter the way children are taught in our nation's classrooms. For instance, assume a teacher is instructing children in mathematics. After working a number of problems on the board to demonstrate the principles involved, the teacher writes a problem on the board and invites a student to come to the front of the class and solve it. Obviously, if the student makes a mistake, the teacher must correct it, or the class will be confused. But the teacher's correction means that the error committed by a personally identifiable student has now been communicated to the class. Moreover, it is conceivable that the student's error, or an accumulation of such errors over the school year, might influence the final grade the teacher assigns to that student. At the very least, the teacher might take the student's performance into account in determining whether the class needs additional time on this lesson or is ready to move ahead to the next group of problems.

The foregoing scenario occurs every day in classrooms across America. Yet under the Tenth Circuit's analysis, the teacher has violated FERPA. A personally identifiable "education record" has been created and maintained on the chalkboard, received by the teacher, and disclosed to every other student in class. The only way to avoid violating FERPA here is either (1) to stop letting students try to solve problems, or (2) to stop teachers from correcting the students' mistakes. Congress did not mean to turn traditional teaching methods upside down when it enacted FERPA.

Falvo brought this action because her children were "embarrassed" by the peer grading practiced at the Owasso School District. The School District Defendants appreciate the desire of a parent to shield her children from life's unpleasantness. Yet prohibiting peer grading will not stop children from being embarrassed in school. Children who look different, who speak with a different accent, who run slower on the playground, who are taller or shorter or heavier or thinner than their classmates, will, at times, be teased and ridiculed by those classmates.

Prohibiting peer grading will not insulate students from embarrassment. It will, however, needlessly burden education. Should this Court affirm the decision of the Tenth Circuit, the law will be "clearly established" that FERPA prohibits educational practices utilized by teachers everywhere. Those educational practices will then be abandoned. Because there are well-established pedagogical benefits promoted by peer grading, and because there is no indication that Congress intended

FERPA to alter those practices, the School District Defendants submit that there must be some strong countervailing principle to justify departing from the analysis followed by the FPCO and invalidating an educational practice as old as our nation. Neither the court of appeals nor Falvo has articulated such a principle. The decision of the court of appeals in this case should be reversed.

CONCLUSION

Viewed in light of the two goals Congress intended FERPA to advance, allowing parents access to their children's educational records and protecting those records from access by unauthorized persons, the Tenth Circuit's analysis sweeps far too broadly. It is readily apparent that the goal of allowing parental access to student records is not in any way promoted by construing daily homework papers and routine tests as "education records." Falvo herself testified that she learned of the Owasso School District's practice of peer grading by examining the school work her children brought home. (J.A. 10). Nothing in the text or legislative history of FERPA suggests that Congress perceived that schools across America were denying parents access to routine papers such as this.

The second goal of FERPA is to protect education records from access by unauthorized persons. Nothing in the text of the statute or in its legislative history suggests that Congress ever contemplated that the "records" Congress sought to protect included scores on daily homework assignments and routine tests. The FPCO's position with regard to peer grading has been public since at least

1993, yet Congress has never acted to amend the statute or otherwise disapprove of the FPCO's interpretation.

The decision of the court of appeals radically alters how teachers may conduct their classrooms. This Court should not endorse such a radical change in educational practices without a strong showing that Congress intended such a result, and there is no such indication in the text or legislative history of FERPA. The decision of the United States Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,

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20 U.S.C. § 1232g. Family educational and privacy rights

(a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions

(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under this section) that has a policy of denying, or effectively prevents, the parents of students the

right to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section.

(C) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (D), confidential recommendations –

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(D) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (C), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii)

such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4)(A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which –

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(B) The term "education records" does not include –

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5)(A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of federally-supported education programs; recordkeeping

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following –

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C)(i) authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities, under the conditions set forth in paragraph (3), or (ii) authorized representatives of the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3);

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted –

(i) before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve the student whose records are released, or

(ii) after November 19, 1974, if –

(I) the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released; and

(II) the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student.[1]

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed

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[1] So in original. The period probably should be a comma.

when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of title 26;

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons; and

(J)(i) the entity or persons designated in a Federal grand jury subpoena, in which case the court shall order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished to the grand jury in response to the subpoena; and

(ii) the entity or persons designated in any other subpoena issued for a law enforcement purpose, in which case the court or other issuing agency may order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished in response to the subpoena.

Nothing in clause (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless –

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, or (C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs: *Provided*, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall

be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student. If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

(6)(A) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense, the final results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime or offense with respect to such crime or offense.

(B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

(C) For the purpose of this paragraph, the final results of any disciplinary proceeding –

(i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and

(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

(c) Surveys or data-gathering activities; regulations

Not later than 240 days after October 20, 1994, the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) Students' rather than parents' permission or consent

For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) Informing parents or students of rights under this section

No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution effectively informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) Enforcement; termination of assistance

The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

(g) Office and review board; creation; functions

The Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

(h) Disciplinary records; disclosure

Nothing in this section shall prohibit an educational agency or institution from –

(1) including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or

(2) disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.

(i) Drug and alcohol violation disclosures

(1) In general

Nothing in this Act or the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.) shall be construed to prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student's education records, if –

(A) the student is under the age of 21; and

(B) the institution determines that the student has committed a disciplinary violation with respect to such use or possession.

(2) State law regarding disclosure

Nothing in paragraph (1) shall be construed to supersede any provision of State law that prohibits an institution of higher education from making the disclosure described in subsection (a) of this section.